APPENDIX D

FEE SHIFTING REPORT SEPTEMBER 11,2001

The fee shifting referred to in this report deals with a proposal to allow a party successful in asserting rights under the New Jersey Constitution to collect reasonable counsel fees from the adversary with certain limitations. This report is now the third one written by this subcommittee on this issue. The last report came back from the New Jersey Supreme Court with four questions which this report seeks to answer.

Those questions are:

1. What is California's cost and actual experience under its fee-shifting legislation?

2. What resources does New Jersey now have to bring public interest suits (e.g. are private firms developing public interest units)?

3. If fee shifting were allowed in cases in which a right under the New Jersey Constitution was vindicated, what types of suits would be brought that are not now being brought? That is, is there a real problem in New Jersey in getting such suits brought?

4. Would a pilot be feasible.?

After further discussion and investigation, the subcommittee has prepared answers to these questions which are set forth below. Due to the number of permutations this issue has gone through, this report will first set forth the gist of the earlier reports and the procedural history which brings us to the Supreme Court's four questions. For those who prefer the unabridged editions of the earlier reports, those reports are attached. (Attachments I and II)

BACKGROUND

The Initial Proposal

This project began with a proposal submitted to the Civil Practice Committee by Professor Frank Askin of the Rutgers University Constitutional Litigation Clinic on behalf of the American Civil Liberties Union of New Jersey, the Education law Center, and the John J. Gibbons Fellowship in Public Interest and Constitutional Law for the firm of Gibbons, Del Deo, Dolan, Griffinger and DelVecchio. The proposal would allow a party successful in asserting an important right affecting the public interest to collect reasonable attorneys fees and expenses from the adversary provided the victor's direct economic stake in the litigation would not normally justify the expense of the litigation.

Specifically, the proposal would have amended R. 4:42-9(a) with the following language:

> In a civil proceeding that (1) results in the establishment, protection or enforcement of an important right affecting the public interest and (2) is brought on behalf of a party whose direct economic stake in the outcome of the litigation would not normally justify the expense of the litigation, the court shall award reasonable counsel fees and litigation expenses to individuals, unincorporated associations or non-profit corporations who, as plaintiffs to the proceeding, have prevailed in asserting such right. This rule shall not apply to cases in which the award of counsel fees and litigation expenses is otherwise provided by statute.

The proposal was triggered by the void in public interest litigation left by the abolishment of the Department of the Public Advocate in 1994. In support of the proposal, Stephen Eisdorfer submitted a certification setting forth the difficulty in finding attorneys to take over the public interest litigation within the Division of Public Interest Advocacy when the Public Advocate's Office was abolished. The proposal attempts to address this funding of public interest advocacy by shifting the expense of successful public litigation to the losing defendants.

Rejection of Initial Proposal by Subcommittee

In the its first report dated February 23, 1999, the subcommittee rejected the proposal for the following reasons.

- Public interest is not readily defined and that question would generate much litigation (any litigant who was successful in changing the law could argue public interest).

- Since many of the major areas of the law implicating the public interest already have fee shifting provisions (LAD, Consumer Fraud, Environmental Rights Act, class actions), much of the area is covered anyway and without the problems of defining public interest.

- Requiring a defendant, who relies on settled law and who happens to be named in a test case to address a systemic problem, to pay counsel fees seems inherently unfair. A "mom and pop" store, small public entity, or an individual could be named as a defendant in a public interest case and be liable for enormous fees. In addition, allowance of fees was viewed as unfairly punitive to a defendant who relied on existing law to pay enhanced costs because the plaintiff was successful in changing that law. The rule would impose a disproportionate burden on the

targeted defendant.

- Requiring public entities to fund public interest litigation presents a policy problem. The subcommittee could find no logical basis to distinguish between public and private entities. Yet by allowing the assessment of fees against public entities, the court would be requiring the State and local governments to fund public interest advocacy - at least to the extent that the litigation is successful - contrary, in part, to the Legislature's purpose in abolishing the Office of the Public Advocate.

- The provision has a serious potential for abuses by parties who dress their claims as public interest litigation in order to be able to collect attorneys fees.

The Minority's Initial Report

While the entire subcommittee agreed that the proposal was problematic due to the difficulty in determining whether a case was in the public interest and the litigation that question would generate, a minority of the subcommittee developed an alternative to address that problem. The minority proposed that fee shifting be permitted where a litigant asserts a right under the New Jersey State Constitution. This alternative had the advantage of more clearly determining which cases would be subject to fee shifting. However, it would also encompass purely private cases where no public interest is involved and would exclude those public interest cases that did not involve constitutional rights.

The minority's proposal also placed certain sensible constraints on the calculation of the counsel fee. While the majority disfavored the adoption of any rule, it found the approach taken by the minority less objectionable than the original proposal.

Civil Practice Committee's First Determination

On March 8, 1999 the subcommittee's majority and minority reports were presented to the Supreme Court Civil practice Committee. In a 10-10 vote, the Supreme Court Civil Practice committee was equally split between the majority and minority reports. In light of this inconclusive vote, the subcommittee was asked to investigate the issue further.

The Subcommittee's Supplemental Report

After a considerable effort in researching the law in New Jersey and other states and meeting with proponents of the original proposal and attorneys whose practices may be affected by it, the position of the subcommittee remained essentially the same.

- A majority of the subcommittee opposed both the original proposal and the minority's proposal.

- A minority of the subcommittee supported an award of counsel fees to a successful claimant suing under the New Jersey State Constitution.

- The subcommittee unanimously agreed that if a fee shifting provision is adopted, for policy reasons, preferably it should be done by legislation rather than rule.

- The subcommittee unanimously agreed that if any feeshifting proposal is adopted it should contain the limitations on calculating the fees set forth in the minority report.

Limitation on Attorney Fees if Minority Proposal Accepted

The limitations which would be placed on the calculation of the fee are as follows:

1. A cap would be placed on the hourly rate ($150 per hour for attorney and $50 per hour for support staff).

2. No enhancement would be allowed for novelty or complexity of the claim. (The provision recognizes the unfairness of penalizing litigants who reasonably relied on what was thought to be settled law.)

3. A hardship abatement would be available if the fee award would "inflict a substantial and undue financial hardship" upon the defendant or, if it is a public entity, its taxpaying constituents.

4. In fixing the fee the court would be required to take into consideration reasonable efforts to resolve the dispute.

5. Fees would be recoverable only by successful claimants whose direct economic stake in the litigation would not have reasonably justified the costs of pursuing the litigation.

If, indeed fee shifting is allowed, the entire subcommittee agreed with the above constraints.

Current Fee Shifting Provisions Under New Jersey Law

The reports of the subcommittee noted that currently about 150 statutes in New Jersey allow counsel fees to the prevailing party. While most of these statutes are obscure (e.g. N.J.S.A. 4:8-30, Sale and Delivery of peach, Plum, Pear and Cherry Trees), others affect a significant number of cases, namely the Consumer Fraud Act, N.J.S.A. 5:8-19, the Environmental Rights Act, N.J.S.A. 2A:35A-10, and the Law Against Discrimination, N.J.S. 10:5-1 et seq. R.4:42-9(a) allows fee shifting in family actions, cases involving a fund in court, probate actions, certain foreclosure proceedings, and certain insurance cases. Fee shifting, thus, has been allowed in New Jersey, but in defined areas of the law either specifically considered by the legislature or the subject of longstanding judicial policy.

Case Types Minority's Proposal would affect

While it is difficult to predict all of the areas of the law that might be affected by the minority's proposal those that come to mind are: student right's cases, creche cases, leafletting (shopping mall) cases, curfews, prisoner's rights, illegal search and seizures (under State Constitution), privacy, Megan's Law (tier classification), parental notification on abortion, Mt. Laurel, Thorough and Efficient education suits, and beach fee disputes.

Civil Practice Committee's Action on Supplemental Report

On February 7, 2000, the Civil Practice Committee considered the subcommittee's supplemental report. In a vote of 16 to 10, the Committee voted against recommending the minority proposal as a matter of policy. Nonetheless, if the Court were to favor a fee shifting procedure along the lines of the minority proposal, the Committee voted 19 to 7 against the adoption of such a proposal by court rule. The matter then went to the New Jersey Supreme Court.

RESPONSE TO THE SUPREME COURT'S FOUR QUESTIONS

After further investigation and discussion, the subcommittee responds to the Supreme Court's questions as follows.

Question 1. *What is California's cost and actual experience under its fee-shifting legislation*?

The subcommittee could find little empirical data available to answer this question. No information is available on the cost of the California legislation to the state and local governments. Apparently, it is buried in multiple budgets and mixed in with other costs. The only thing we could find out is that California appropriated $5 million for the costs of the legislation when it was first enacted. There is a general problem in differentiating the fees paid to vindicate a right under the federal constitution and

those under the state constitution. The issue is further clouded by the fact that the fees are paid by the individual defendants and come out of the budget for each individual entity.

There is no central clearing house that separates and analyzes the cost to the state for litigation under its fee shifting statute. While most cases are brought against the state, each state defendant pays fees from its own budget and does not separate the fees out, making it impossible to segregate the allocation of those fees paid out under the fee shifting legislation. Where the defendants are not state entities, information regarding the attorney fees is not reported.

For purposes of fee shifting in California, there is no differentiation between public interest cases brought under the U.S. Constitution and those brought under the State constitution. Moreover, the California statute is an "umbrella" statute encompassing many causes of action that are covered by specific legislation in New Jersey. Finally, the California legislation addresses the gamut of public interest litigation and is not limited to cases implicating a constitutional right. The consensus was that even if the information regarding cost experience was available, it would have little relevance to New Jersey where the proposal for fee shifting would be limited to those cases vindicating a right protected by the state constitution.

Question 2. *What resources does New Jersey now have to bring public interest suits (e.g., are private firms developing public interest units)?*

Public interest litigation in New Jersey has been brought by a wide variety of organizations and individuals, including non profit organizations set up for that purpose, New Jersey chapters of national organizations interested in particular issues, pro bono work of private law firms, the State Attorney General's Office, and Legal Services of New Jersey.

The impetus for this proposal was the abolishment of the Division of Public Interest Advocacy within the Department of the Public Advocate. At its height, the office had ten lawyers working for it full time, and by the end, the staff was down to one or two full time attorneys.

Set forth below is the information the subcommittee was able to obtain on who is bringing public interest litigation in New Jersey.

Non Profit Organizations

Attached to this report is a list of non profit organizations which have been active in the State in pursuing public interest litigation. This list is representational only and does not profess to include the myriad non profit organizations that pursue in litigation in this State. See Attachment III.

Pro Bono Work by Private Law Firms

According to the Pro Bono Report Card published in the New Jersey Law Journal on July 2, 2001 (165 N.J.L.J. 29), attorneys at the 19 firms which responded to the Law Journal's survey, spent 63, 588 hours on pro bono cases in 2000. The majority of hours spent on pro bono work was the result of court appointments, but a significant amount of time was devoted to representing nonprofit and charitable organizations.

Conversations with members of the firms indicate that only two firms (Lowenstein Sandler and Gibbons, DelDeo, Dolan, Griffinger & Vecchione) have a significant commitment to public interest litigation, but other firms engage in pro bono representation of charitable and/or non profit entities. Gibbons, Del Deo has two attorneys assigned to the John J. Gibbons Fellowship to work full time on public interest, constitutional litigation and advocacy cases.

Michael R. Clarke, Esq., from Drinker, Biddle & Shanley,

indicated that in addition to representing defendants as court appointed attorneys, the firm has 5 or 6 attorneys working part time with the Battered Women's Shelter in Morris County handling largely domestic violence cases and 5 attorneys working with the Volunteer Lawyers for Justice in Essex County, a new program just started in January 2001 which represents plaintiffs in commercial disputes, landlord-tenant matters, bankruptcies and matrimonial/family law issues. These cases constitute probably less than 10% of the firm's business.

Likewise, Glenn A. Clark, Esq. from Riker, Danzig, Scherer, Hyland & Perretti acknowledged that the overwhelming majority of the firm's pro bono work evolved from court appointments but cited examples of the types of cases that the firm had undertaken including representation of the Battered Women's Shelter, Habitat for Humanity, Hospice, Children's Center for Therapy and Learning, and Hope House.

State Attorney General's Office

The State Attorney General's Office with its responsibilities to the public becomes involved in litigation in which it asserts the public interest. The Attorney General's office undertook the beach fees cases which the Public Advocate had previously handled. It has filed an amicus brief in support of gay rights. The subcommittee was advised that the Attorney General's Office had taken a look at the curfew issue but made the decision not to get involved as amicus. In other cases, though, such as Abbott v. Burke, 164 N.J. 84 (2000), the Attorney General's Office has taken positions contrary to those supported by the proponents of the proposal before the committee.

Legal Services of New Jersey

Legal Services of New Jersey, Inc. has been active in cases with statewide implication. The organization both initiates

litigation (e.g. Sanchez v. Department of Human Services, 314 N.J. 11 (App. Div. 1998) challenging Welfare Reform Law) and enters cases as amicus (e.g. Community Realty Management, Inc. v. Harris, 155 N.J. 212 (1998) challenge to housing regulations). Many of their cases would be classified as implicating public interest - welfare, housing, landlord/tenant, creditors' rights etc.

Question 3. *If fee-shifting were allowed in cases in which a right under the New Jersey Constitution was vindicated, what types of suits would be brought that are not now being brought? That is, is there a real problem in New Jersey in getting such suits brought?*

Attorneys Lawrence Lustberg, Esq., of Gibbons DelDeo Dolan Griffinger & Vecchione, Director of John J. Gibbons Fellowship and Stephen Latimer, Esq. of Laughlin & Latimer, Chair of Individual Rights Section of the State Bar Association, opine that attorneys have to be selective in the public interest cases they pursue. If fee shifting were available, more attorneys would be more likely to engage in public interest litigation. Specific case types that would be pursued are prisoner rights, Mt. Laurel issues and Thorough and Efficient education issues. While cases implicating these issues have been brought, the concern is that in the absence of fee shifting, individuals are daunted by both the process of organizing a class and the cost of litigation.

Because of the subjective and elusive nature of the question of whether there is a real problem in bringing public interest litigation in New Jersey, the Subcommittee does not feel it is in a position to evaluate either the adequacy or sufficiency of the current resources. As noted in answer to Question 2 above, public interest litigation is ongoing in New Jersey. Attached to this report is a list of some cases brought under the New Jersey State Constitution

implicating the public interest. (Attachment IV). This list is not all inclusive, but merely representational. Many other cases implicating the public interest have been brought or are yet pending in the State courts.

In the last two years the New Jersey Courts have grappled with many public interest issues including free speech rights to leafletting at the malls (Green Party v. Hartz Mountain Industries, 164 N.J. 127 (2000) brought by the ACLU), Megan Law challenges (Mulligan v. Panther Valley , 337 N.J. Super. 293 (App. Div. 2001) brought by a member of the property owners' association), parental notification for abortions (Planned Parenthood v. Farmer, 165 N.J. 609 (2000) brought by reproductive health care centers and others, frozen embryos (J.B. v. M.B., 2001 WL 909294 (N.J.), Thorough and Efficient education issues (Abbott v. Burke, 164 N.J. 84 (2000) brought by the Education Law Center), to name a few.

From all of this evidence, it appears that New Jersey has a healthy climate for public interest litigation and that such litigation is brought on many important issues. Nonetheless, it appears reasonable to assume, based on the conversations with those involved in public interest litigation, that some additional legitimate suits would be brought if fee shifting were allowed. On the other hand it seems equally certain that permitting fee shifting will also lead to some opportunistic litigation, as attorneys attempt to shoehorn cases into a public interest framework or undertake litigation of questionable significance.

Question 4. *Would a pilot be feasible?*

The subcommittee considered whether a pilot limited to a particular vicinage or case type or time period would work, and concluded that a pilot would not be feasible.

A pilot limited to specified vicinages would encourage forum

shopping. In those cases where venue can be established in a number of vicinages, the attorney would merely file the complaint in the vicinage with the pilot program or attorneys in pending cases would file motions to transfer venue to the pilot counties.

Also, a pilot limited to specified vicinages would be unfair, since we are dealing with an area of substantive rights rather than mere procedure. In those cases where venue could not be established in the pilot, the result would be unfair, since on the same facts one successful plaintiff would recover attorneys fees and the successful plaintiff in the non pilot county would not.

If the pilot were limited to a particular case type, the results of the pilot would provide information about that case type only. The results would not be necessarily helpful in determining the impact of fee shifting on other case types or on the general category of public interest litigation. If, indeed, fee shifting is allowed for a particular case type, it should be allowed because a specific need has been identified for that case type.

Placing a time limitation on any pilot will be difficult, because these cases tend to take a long time before any resolution is reached and the appeal process is exhausted. In addition, sometimes it takes years before social factors or the development of the underlying law create an environment in which the full impact of the fee shifting rules can become known.

Respectfully submitted,

Hon. Amy Piro Chambers, Chair
Jeffrey Miller, Esq.
Melville D. Miller, Jr., Esq.
Hon. Jack M. Sabatino
William J. Volonte, Esq.
Thomas P. Weidner, Esq.

REPORT OF THE SUBCOMMITTEE ON FEE SHIFTING IN PUBLIC INTEREST LITIGATION OF THE CIVIL PRACTICE COMMITTEE

On October 5, 1998 the Supreme Court Civil Practice Committee established the Subcommittee on Fee Shifting in Public Interest Litigation. The mandate of the subcommittee was to consider and recommend to the full Committee whether *R.* 4:42-9 should be amended to provide for the award of counsel fees to a litigant who has vindicated "an important right affecting the public interest."

The need for the examination of this matter was precipitated by the submission to the Civil Practice Committee of a proposal (attached as Appendix A) for a rule amendment prepared by Professor Frank Askin of the Rutgers University Constitutional Litigation Clinic on behalf of the American Civil Liberties Union of New Jersey, the Education Law Center and the John J. Gibbons Fellowship in Public Interest and Constitutional Law of Gibbons, Del Deo, Dolan, Griffinger and DelVecchio. Presently, *R.* 4:42-9(a) (attached as Appendix B) allows counsel fees in family actions, cases involving a fund in court, probate actions, actions for the foreclosure of a mortgage or tax certificate or certificates, actions upon a liability or indemnity policy of insurance, as expressly provided by other Court rules or as permitted by statute. The proposal would add to this list cases where an important public interest has been vindicated. Askin argues that the need for the rule amendment is now

The subcommittee, through staff, also did an Internet inquiry via the National Center for State Courts and contacted the National Association of Attorneys General, to ascertain the fiscal impact that comparable provisions had in other jurisdictions. Following considerable debate, the majority of the subcommittee, for the reasons to be discussed, concludes that the Committee should not recommend such an amendment to the rule.

Attached as Appendix E is a copy of Section 1021.5 of the California Code of Civil Procedure, an example of a statutory provision authorizing an award of counsel fees in cases involving the public interest. The subcommittee notes that the enactment of the provision in California necessitated an initial legislative appropriation in 1989 in excess of $7.6 million. Thus, a rule if adopted may have a significant and unquantifiable fiscal impact on the State.

Moreover, the subcommittee found that attempting to draft an appropriate rule is so fraught with problems that it makes no sense to do so. The subcommittee struggled with a number of troubling issues that will be discussed.

The minority report is also attached and contains a draft rule amendment. Although the majority disfavors adoption of any rule, it nonetheless prefers the approach taken by the minority as less objectionable than that taken in the proposal.

recognized under the State Constitution are not protected at all under the United States Constitution, such as the rights of students in poor urban school districts to a thorough and efficient education. However, even a narrow definition restricted to promotion of a State constitutional right would likely invite litigation on the interpretation of its scope. Conceivably, in an attempt to invoke the fee award provision, litigants in eminent domain actions or personal injury actions may argue that a State constitutional right is involved. We would certainly see an increased interest in the New Jersey Constitution, and the change could affect the development of state constitutional law as litigants tried to shoehorn their cases into a constitutional framework in order to collect attorney fees. In addition collection of the attorney's fee would turn on whether the court ultimately decided the case on constitutional law or other grounds.

Unfairness to Defendant

The committee was troubled with the potential for unfairness in requiring defendants to pay for fees in ground breaking litigation. A defendant that acted and then defended a case relying on current law would be required to pay fees if the courts decided to change the law in that litigation. A particular defendant would be required to pay the entire fee in a test case brought to rectify a systemic problem. Under the proposal, a "mom and pop business", a small public entity, or an individual could be named as a defendant in a "public interest" case

thought that the existing protections against frivolous litigation under *R.* 1:4-8(b) and the pertinent statute, *N.J.S.A.* 2A:15-59.1, were already sufficient.

Potential for Abuses

Members had grave concerns about possible abuses. It was suggested that a rule, if adopted, should have built in a standard that considers the reasonableness of counsel's conduct and of the fees.

Settlement practices were also discussed. Clearly, the threat of obtaining abundant fees provides leverage in settlement negotiations and could be misused to bring about settlements in cases not truly reflective of the public interest. Alternatively, fee issues could supersede the interest of the client. Concern was also expressed that a settlement triggered in part by the fee provision could result in a sizeable fee, a good result for the plaintiff and no public interest being served.

The subcommittee anticipated that a rule amendment would also lead to the usual disputes on the amount of fees to be awarded. It was pointed out that there is a standing order governing the Attorney General's Office which confines fees to $130 per hour in comparable cases. It was generally agreed that to curb disputes and abuses, a rule would

is consistent with the historical authority exercised by the New Jersey court system in creating exceptions to the American Rule and is within the specialized expertise of the court system and Civil Practice Committee.

The subcommittee agrees that counsel fees have been consistently held to constitute matters of practice and procedure within the Court's constitutional grant of power. See, *e.g.*, *Busik v. Levine,* 63 *N.J.* 351 (1973). However, the subcommittee finds it unnecessary to deal with this issue. As previously discussed, adoption of a rule would have a significant fiscal impact on the State.

Conclusion

The subcommittee recommends against the adoption of a rule awarding counsel fees to a litigant who has vindicated an important public interest. The purpose of the rule would be to provide a means to help fund public interest litigation which is not receiving enough support from public or private funding sources. The rule would place that financial burden on defendants who lose the litigation.

The subcommittee rejects the proposal for these reasons:

1. The difficulties in adequately defining what is the public interest and the litigation that question would generate.

Respectfully submitted,

Hon. Amy Piro Chambers, Chair

Marty M. Judge, Esq.

Jeffrey J. Miller, Esq.

Thomas P. Weidner, Esq.

Michelle V. Perone, Esq., AOC Staff

(did not join in majority -- Professor Robert A. Carter, Melville D. Miller, Jr., Esq. and Professor Jack M. Sabatino)

Dated: February 23, 1999

Minority Report of the Subcommittee on Fee Shifting in Public Interest Litigation

I agree with much of what my thoughtful colleagues state in the majority report of the Subcommittee, but respectfully disagree with their conclusions. In my view, the majority underestimates the benefits of expanding fee-shifting to certain forms of public interest litigation where it is presently not available and overstates the difficulties that such an expansion would create. I see the balance tipping in the other direction. With careful drafting and application, such a rule could prove quite beneficial in protecting the basic rights of New Jersey citizens, especially those persons who lack the resources to vindicate them in court.

I do share the majority's aversion to the specific proposal before us, one that would allow fee-shifting under an amorphous "public interest" standard. Such a rule surely would trigger enormous collateral disputes over what cases are or are not truly in the public interest, and would be inconsistently applied.

Instead, I would favor a more tightly-drawn provision that would allow claimants who prevail in asserting rights under our State Constitution to recover reasonable counsel fees, subject to a few important limitations. Attached to this minority report as Attachment A is a draft of such a rule, one which I am pleased that my Subcommittee colleagues at least regard as "less objectionable" than the proposal submitted to us.

protections, our state constitution is presently a poor cousin of its federal counterpart. Plaintiffs who prevail in advancing rights under the United States Constitution usually can recover their counsel fees, in state or federal court, under 42 U.S.C. § 1988. Additionally, a patchwork of over 160 assorted New Jersey statutes and court rules authorize fee-shifting.[2] Some of them cover arcane subject matters such as the authenticity of peach trees,[3] abandoned waterworks,[4] mechanics liens,[5] mobile homeowner rights,[6] unfair cigarette sales,[7] and tax certificate foreclosures.[8]

The omission of state constitutional claims from these fee provisions is incongruous. While it is true that only a few other states authorize fee shifting in cases brought under their respective constitutions,[9] no other state has a constitution that

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[2]Kevin P. Duffy, "201 New Jersey Counsel Fee Statutes," 127 N.J.L.J. 34 (February 7, 1991).

[3]N.J.S.A. 4:8-30.

[4]N.J.S.A. 40:62-115.

[5]N.J.S.A. 2A:44-116.

[6]N.J.S.A. 46:8C-3(a).

[7]N.J.S.A. 56:7-32(a).

[8]R. 4:42-9(a)(5).

[9]See Jennifer Friesen, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES § 10-2 (2d ed. 1996) (identifying various statutes, rules and judicial doctrines in Massachusetts, Connecticut, Oregon, and California that enable claimants who prevail in asserting certain rights under their state

representation. Contingent fee arrangements alone are apt to be insufficient to attract private counsel, especially for cases that involve mainly injunctive relief or little or no monetary damages.

The State Department of the Public Advocate, of course, used to bring such cases. It might be contended that the State's elimination of the Advocate in 1994 bespeaks a public policy against government-funded constitutional litigation. That may or not be so. Some, but not all, of the functions of the Advocate are being carried out today by other organizations. But we should also be mindful that the existence of the Public Advocate itself was apparently a reason why this same Committee rejected a similar fee shifting rule proposal years ago. If that is true (the historical record we have from old Committee files is unclear), it seems contradictory to have scrapped a fee proposal in 1982 because we had a Public Advocate and then to scrap the idea again in 1999 because we *don't* have one.

Further, the potential recovery of fees in state constitutional cases may expand the players in such matters beneficially. For example, a rule change might enable *Mount Laurel* housing cases to be pursued feasibly by not only builders who can command expensive counsel, but also by the low and moderate income persons who actually need such housing. Likewise, individual schoolchildren could seek to vindicate their rights to a "thorough

in unnecessarily litigious conduct where the opposing party is willing to settle on reasonable terms. It excludes those portions of services and expenses devoted to non-constitutional claims and to constitutional arguments that were unsuccessful.

In sum, my alternative fee-shifting proposal strives to be effective in promoting the public interest but also to be fair. While that alternative still may need considerable fine-tuning, I find it preferable to the majority's inclination to dismiss the whole concept of a new fee-shifting rule outright.

II. Process

Given the importance of these issues, I recommend that the proponents of the public-interest fee shifting rule be afforded a chance to address these concerns in person before the Subcommittee or the full Committee. We may well be missing, or misconceiving, something here. The proponents might be able to devise language better than Alternative A that acceptably minimize the problems. Conversely, if the full Committee is inclined to present to the Court a constitutionally-grounded substitute such as Alternative A, we would benefit from inviting reactions to it by experts who practice in this field on a daily basis.

Such a hearing process also should solicit comments from governmental bodies (e.g., the state League of Municipalities,

and in accord with the norms of *Winberry v. Salisbury.*[12]

Nevertheless, the Legislature also may well have concurrent authority over a rule with such substantive dimensions. Rather than purporting to resolve that separation-of-powers issue in the abstract here, it seems wiser to leave that question to the Supreme Court. If we offer the Court a draft proposal, that could trigger a useful review of the concept by all three branches of government, not unlike the inter-branch collaboration that takes place for amendments to the state rules of evidence. It is in the spirit of promoting such a dialogue that I offer this minority report and the attached proposal.

Respectfully,

Jack M. Sabatino, Esq.
Associate Dean, Rutgers-Camden Law School
February 22, 1999

(Professor Robert A. Carter of the Subcommittee joins in Part I only of this minority report, and endorses the draft Rule presented in Attachment A.)

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[12] 5 N.J. 240 (1950) *See also* McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546(1993)(recognizing court's power to adopt fee-shifting rules). The Court might also consider awarding fees, without a specific rule, as a remedial measure in certain constitutional litigation. This has been the approach of the Oregon Supreme Court. See, e.g., Deras v. Myers, 272 Or. 47, 535 P.2d 541 (1975) (authorizing an award of reasonable attorneys fees to a prevailing claimant under the Oregon Constitution under the Court's general equitable powers). In my view, a new rule authorizing fee-shifting would be preferable to awarding fees on an ad hoc basis. Accord Busik v. Levine, 63 N.J. 351 (1973) (sustaining Court's power to authorize prejudgment interest via rule-making rather than through judicial precedent).

ATTACHMENT II

SUPPLEMENTAL REPORT

OF THE

SUBCOMMITTEE ON FEE SHIFTING IN

PUBLIC INTEREST LITIGATION

OF THE

CIVIL PRACTICE COMMITTEE

January 21, 2000

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INTRODUCTION

On October 5, 1998 the Supreme Court Civil Practice Committee established the Subcommittee on Fee Shifting in Public Interest Litigation. The mandate of the subcommittee was to consider a proposal to amend *R.* 4:42-9 to provide for the award of counsel fees to a prevailing litigant who has vindicated "an important right affecting the public interest" and "whose direct economic stake in the outcome of the litigation would not normally justify the expense of the litigation."

The purpose of the proposed rule is to help fill the void in funding public interest litigation left by the abolishment of the Department of the Public Advocate in 1994. The proposal would accomplish this by shifting the expense of successful public interest litigation to the defendants.

After initial discussions and investigations, a majority of the subcommittee concluded that drafting an appropriate rule was so fraught with problems that it made no sense to do so. The subcommittee struggled with a number of troubling issues, and, in the end, rejected the proposal for the following reasons:

- the difficulty in defining public interest and the litigation that question would generate;
- the unfairness in requiring payment of counsel fees by a defendant who relies on settled law and who happens to be named in a test case to address systemic problems;
- the policy problem of requiring public entities to fund public interest litigation;
- the potential for abuses by parties who dress their claims as public interest litigation in order to be able to collect attorneys fees; and

Following consideration of these additional sources of information, the subcommittee has prepared this supplemental report to the full Committee.

Overview of Subcommittee's Final Conclusions

After completion of further investigation, the positions of the majority and minority members of the subcommittee have not changed fundamentally from the first report. Thus, the subcommittee has reached the following conclusions:

- The subcommittee unanimously agrees that a fee shifting provision, if one is adopted at all, preferably should be adopted by legislation.[1]
- A majority of the subcommittee recommends against the adoption of either the original proposal or the minority's proposal.
- A minority of the subcommittee still supports the minority proposal to permit fee shifting by successful claimants suing under the New Jersey State Constitution.
- The subcommittee unanimously agrees that if any fee shifting proposal is adopted it should contain the limitations on calculating the fees set forth in the minority report.

A discussion of the subcommittee's work that led to these conclusions is set forth below.

[1]The minority would note, however, that the court has the constitutional power to enact fee-shifting through a court rule even in the absence of a statute. See N.J. Const. Art. VI, §2, ¶3; *Winberry v. Salisbury*, 5 *N.J.* 240 (1950). The minority suggests that ideally a fee-shifting measure for state constitutional litigation would be the product of collaboration among all three branches of government in New Jersey, similar to the process used for adopting new Rules of Evidence.

In a civil proceeding that (1) results in the establishment, protection or enforcement of an important right affecting the public interest and (2) is brought on behalf of a party whose direct economic stake in the outcome of the litigation would not normally justify the expense of the litigation, the court shall award reasonable counsel fees and litigation expenses to individuals, unincorporated associations or non-profit corporations who, as plaintiffs to the proceeding, have prevailed in asserting such right. This rule shall not apply to cases in which the award of counsel fees and litigation expenses is otherwise provided by statute.

The minority's proposal (Exhibit B) would award reasonable counsel fees and litigation expenses to a party successful "in the establishment, protection or enforcement of a right under the New Jersey Constitution." The minority proposal is intended to address the present anomaly, in which prevailing plaintiffs may recover their counsel fees in cases involving most Federal constitutional claims, see 42 *U.S.C.* § 1988, but not State constitutional claims. Excluded from the provision would be eminent domain proceedings and cases where an award of counsel fees is otherwise provided by statute or court rule. The minority's proposal places certain limitations on the calculation of fees:

1. Fees would only be allowed for work done on constitutional claims and not on other claims involved in the lawsuit;

2. Fees would be capped at the rate of $150 per hour for attorney time and expert witness time and $50 per hour for staff time;

3. No enhancement of the award would be allowed for novelty or complexity of the claim; and

4. In assessing the reasonableness of the time spent, the court should consider the reasonable efforts to resolve the dispute prior to or during litigation.

with the vagueness of such a standard. Whether the issues in a particular case involve the public interest would be the subject of much dispute and litigation. The experience in California confirms this concern. (See Exhibit D.)

To circumvent the problem of defining public interest, the minority report proposes to limit fee shifting to matters asserting a State Constitutional claim. In this way, the scope of the fee shifting proposal would be clearer. However, it would cover only that portion of public interest litigation which raises state constitutional issues.

Fairness

The subcommittee questioned the appropriateness of addressing the lack of funding for public interest litigation by making the defendants pay. In particular, fee shifting will often place a disproportionate burden on the target defendant. This result seems particularly unfair when the defendant is one of a group doing the same thing, or where the defendant is relying on existing law. This element of unfairness is present under both the original proposal and the minority proposal.

Consideration was given to allowing fee shifting in situations where the defendant was violating existing law and to precluding fee shifting in cases raising novel issues or issues of first impression. However, it was recognized that in many situations this distinction would be difficult to make and would result in even further litigation.

As a result, under both the original proposal and the minority proposal, a defendant who relied on existing law could be found liable, subject to possible defenses of good faith or qualified immunity, for substantial fees generated in a successful test case.

Potential Impact of the Proposal on New Jersey Law

As the subcommittee's original report noted, New Jersey currently has 150 statutes allowing for an award of counsel fees to the prevailing party. While many of these statutes are obscure (*e.g., N.J.S.A.* 4:8-30, *Sale and Delivery of Peach, Plum, Pear and Cherry Trees*; *N.J.S.A.* 26:4-122, *Prevention of Introduction of Communicable Diseases by Vessels*), others, such as the *Consumer Fraud Act, N.J.S.A.* 56:8-19 , the *Environmental Rights Act, N.J.S.A.* 2A:35A-10, and the *Law Against Discrimination, N.J.S.A.* 10:5-1 et seq., affect a considerable number of cases. In addition, the Court Rules currently provide for fee shifting in certain situations. Specifically, *R.* 4:42-9(a) allows counsel fees in family actions, cases involving a fund in court, probate actions, certain foreclosure proceedings, and certain insurance cases. Thus, New Jersey has allowed fee shifting, but mainly in discrete areas of the law that were specifically considered by the Legislature or have been the subject of longstanding judicial policy.

It is difficult to predict all of the areas of the law that would be affected by either of these fee shifting proposals. Considerable time was spent by the subcommittee and its guests trying to identify the impact of the proposals. If the minority's proposal is accepted and fee shifting is allowed in cases brought under the New Jersey State Constitution, some of the cases in which fee shifting might be allowed are: student's rights, creche cases, leafletting (shopping mall) cases, curfews, prisoner rights, illegal search and seizure (under State Constitution), privacy, Megan's Law (tier classification), parental notification on abortion, Mt. Laurel, Thorough and Efficient Education suits, and beach fee disputes. Potentially broader categories of fee shifting cases may arise under the original proposal. For example, the potential availability of legal fees in Megan's Law tier classification proceedings raises the possibility that challenges to the propriety of the tier classification and scope of notification would be couched in constitutional terms, for the sole purpose to recoup legal

The subcommittee is also concerned that a fee shifting rule, whether under the original proposal or the minority proposal, would generate opportunistic litigation. It is not hard to imagine that efforts would be made to shoehorn cases into a constitutional or public interest framework in order to create a basis for fee shifting. This concern was also expressed by the Civil Trial Bar representatives of the Bar Association.

Calculation of the Fee

In an attempt to address a number of the majority's concerns, the minority proposal placed the following constraints when calculating the fee:

- A hardship abatement would be available if the fee award would "inflict a substantial and undue financial hardship" upon the defendant, or if a public entity, its taxpaying constituents. This provision helps to alleviate the potential unfairness of having an economically weak defendant bear the cost of groundbreaking litigation.

- No enhancement would be allowed due to the novelty or complexity of the claim. This provision recognizes the potential unfairness of penalizing through enhancements a defendant whose position in the litigation was based on what was reasonably but erroneously thought to be settled law.

- A cap would be placed on the hourly rate allowed, namely, $150 per hour for attorney time and $50 for support staff. This limitation is an effort to avoid having the collection of attorneys' fees as the motivating factor for bringing viable but inconsequential claims. It also helps protect defendants from being subject to exorbitant claims for attorneys' fees.

- In determining the reasonableness of the time spent, the court could consider the efforts taken to resolve the case prior to or during litigation. Thus, a prevailing party who could have reasonably settled the case earlier could be precluded from collecting the additional attorneys' fees accrued thereafter. This provision is designed to encourage settlement. It is also another attempt to winnow out opportunistic litigation. It requires a potential prevailing party to take a more realistic position in the litigation. Also, a party who fails to make a reasonable effort to resolve the dispute prior to filing suit could be precluded from collecting

ATTACHMENT III

Non Profit Organizations

Education Law Center*
New Jersey Protection and Advocacy, Inc.
Legal Services of New Jersey
ACLU*
Constitutional* and Environmental Law Clinics at Rutgers Law School
John J. Gibbons Fellowship in Public Interest & Constitutional Law*
Institute for Social Justice
Public Interest Law Center of New Jersey, Inc.*
Habitat for Humanity
Battered Women's Shelter of Morris County
Volunteer Lawyers for Justice (Essex County)
NJ Lesbian & Gay Law Association
NJEA

Local chapters of:
NOW
Sierra Club
NAACP

* These entities supported the original proposal for an award of counsel fees in public interest litigation.

The Division of Law in the Department of Law and Public Safety has compiled the following list of other public interest groups that have filed actions against the State or who have acted as co-counsel with the State. This list is merely representational as it does not duplicate groups in the above list such as the Education Law Center or NJ Protection and Advocacy, Inc., which have been involved in cases with the State. Nor does it include every public interest group that has ever litigated cases either with or against the State.

AARP New Jersey
Affordable Housing Network
American Littoral Society

Ocean County Chapter, Inc. of the Izaak Walton League of America
Pinelands Preservation Alliance
Public Interest Research Group
Ratepayers Advocate
Raritan Valley Coalition
Rutgers Women and AIDS Clinic
Stockton Peach Action
Surfers Environmental Alliance
The Institute for Justice
The Trust for Public Land
Transportation Alternatives, In.
Tri-State Transportation Campaign, Inc.
United Taxpayers of New Jersey, Inc.
UNPLUG Salem
Widener Environmental and Natural Resources Law Clinic

ATTACHMENT IV

The following list of cases is merely representational and is presented for illustrative purposes only

2. **List of Cases for those Causes of Actions**

Cause of Action	Case Name	Citation	Party who brought action
Beach Fees	Salorio v. Glaser	93 N.J. 447 (1983)	United Senior Alliance
	Slocum v. Borough of Belmar	238 N.J. Super. 179 (Law Div. 1989)	Public Advocate
	Iannone v. McHale	245 N.J. Super. 17 (App. Div. 1990)	Plaintiff
Creche Cases	Resnick v. East Brunswick	77 N.J. 88 (1978)	Plaintiff
	State v. Vawter	136 N.J. 56 (1994)	Plaintiff (Hate Crime Statute)
Curfews	Allen v. City of Bordentown	216 N.J. Super. 557 (Law Div. 1987)	Plaintiff
Search and Seizure	Various	Various	Plaintiff
Leafleting	Green Party v. Hartz Mountain Industries	164 N.J. 127 (2000)	ACLU
	Guttenberg Taxpayers and Rentpayers Ass'n v. Galaxy Towers	297 N.J. Super 404 (Ch. 1996)	RU Constitutional Litigation Clinic
Megan's Law Tiers	Mulligan v. Panther Valley	2001 WL 128466 (2001)	Plaintiff
	Doe v. Poritz	142 N.J. 622 (1995)	ACLU

Thorough and Efficient	Abbott v. Burke	164 N.J. 84 (2000)	Education Law Center
	BOE of Englewood Cliffs v. BOE of Englewood	257 N.J. Super. 413 (App. Div. 1992)	NAACP
	In re Grant Charter School Englewood	164 N.J. 316 (2000)	Education Law Center NJ Charter Public Schools Assoc.
Collective Bargaining	In re NJ American Water Co.	333 N.J. Super. 398 (App. Div. 2000)	Div. Ratepayer Advocate
	AFL-CIO Local 68 v. Delaware River Auth.	147 N.J. 433 (1997)	Plaintiff
	Matter of Div. of Crim Justice	289 N.J. super 426 (1996)	Plaintiff
Election/Ballot/ Recall	NJ Conservative Party v. Farmer	332 N.J. Super. 278 (Ch. 1999)	NJ Democratic Committee
	Board of Freeholders of Morris v. State	159 N.J. 565 (1999)	Plaintiff
	Spadoro v. Whitman	150 N.J. 2 (1997)	Plaintiff
Gay Rights	Dale v. Boy Scouts of America	160 N.J. 562 (1999)	ACLU
	Rutgers Council AAUP v. Rutgers	298 N.J. Super 442 (App. Div. 1997)	NOW Legal Defense NJEA NJ Lesbian & Gay Law Assoc.
	S.B. v. S.J.B.	258 N.J. Super. 151 (Ch., 1992)	Plaintiff

Item I. C. 1.

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September 19, 2001

Ms. Mary F. Rubinstein
Administrative Office of the Courts
Civil Practice Division
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Trenton, NJ 08625-0981

Dear Ms. Rubinstein:

I have had the opportunity to review the draft Fee Shifting report that you did last Tuesday. I regret that once again my schedule has prohibited me from participating in the subcommittee work, but I do have a couple of requested changes.

1. On page 5, I do not concur with the various proposed limitations on the fees, should the proposal be adopted. If these fees are determined to be legitimate, I don't see any reason to distinguish them from treatment of other attorney fee awards. Therefore, please delete any reference to the position on the fee limitations as being "unanimous".

2. Pages 7 and 8. I found the discussion of the California costs experience to appear to be a bit dismissive of the Court's inquiry. Reading our response, the Court might reasonably ask whether California departments which might likely be the targets of such public interest litigation, such as its analogs to New Jersey's departments of human services,

education and corrections, individually had any experience with such litigation. If they did, we could recount it; if they did not, it would further strengthen our point that California really does not offer us much information. If we asked them, we should recite the results more specifically; if we did not ask them, we should. I would similarly reference any discussions we may have had with their analogs to OMS and Legislative Services.

Second, I would ask the deletion of the last sentence of the question one section on page 8 (opening with the words "The consensus was that even..."). Since California's statute is considerably broader than New Jersey's, information to the effect that there was not a tremendous cost impact would presumably suggest that New Jersey would not face calamity in adopting such legislation. It does not seem to be relevant, as our comment might imply. If we indeed spoke to the court administrative office and others in the budget office and legislature, and determined that no one had any significant information, one might reasonably draw the conclusion that the statute in California had not in fact imposed an earthshaking burden. I would suggest that it would be prudent to at least acknowledge that fact, since we are responding to an inquiry from the Court.

3. On page 9, the first sentence of the second paragraph under "pro bono work", to the effect that only two firms "have a significant commitment to public interest litigation," seems to me unnecessary and unwise, and from my own experience inaccurate. While other firms may not have made the same visible commitment by dedicating portions of the time of one or more staff to such work, it is Legal Services' experience that a significant number of major firms contribute to pro bono activity, and that much if not most of this work could be characterized as "public interest," a term which itself is imprecise. I would either delete the firm references as unnecessary detail, or alternatively simply say that "a number of firms appear to be involved in pro bono or public interest litigation."

The remainder of the report is acceptable to me.

Sincerely,

Melville D. Miller, Jr.
President

MDM/mg